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No. 10-1255

In The Supreme Court of the United States

RICHARD L. COWITT, an individual and Co-Trustee of THE RICHARD AND J.A. COWITT FAMILY TRUST DATED JANUARY 3, 2002; JUDITH A. COWITT, an individual and Co-Trustee of THE RICHARD AND J.A. COWITT FAMILY TRUST DATED JANUARY 3, 2002; THE RICHARD AND J.A. COWITT FAMILY TRUST DATED JANUARY 3, 2002,

Petitioners,

v.

MARK REILLY; ROBIN MORSELLI,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District, Division Four

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED – Continued

2. Was the Court of Appeal correct in affirming that Petitioners had waived the right to arbitrate when the arbitration agreement in question calls out for the application of California law and not the Federal Arbitration Act, 9 U.S.C. § 1 et seq.?

RULE 29.6 DISCLOSURE STATEMENT

Respondents Mark Reilly and Robin Morselli are individuals residing in and for the County of Los Angeles in the State of California.

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SHORT STATEMENT OF FACTS

This action concerns damages associated with the purchase of a single family residence in Agoura Hills, California, a suburb northwest of Los Angeles. In late July 2005, Petitioners Richard and Judith Cowitt sold the home to Respondents Mark Reilly and Robin Morselli. The sale involved a standard California form Real Estate Purchase Agreement, with an arbitration clause, stating that the arbitration was to "be conducted in accordance with Title 9 of Part III of the California Code of Civil Procedure." That includes, California *Code of Civil Procedure* § 1281.2, which, in no uncertain terms, requires that the trial court decides the issue of waiver of arbitration.

After the transfer of the property, a dispute arose when Respondents became aware of numerous defects that had not been disclosed by the Petitioners. To make a very long story short, Respondents attempted to resolve the dispute through mediation, but to no avail. They filed a lawsuit in June of 2008. The lawsuit proceeded with multiple court appearances by Petitioners (wherein they never mentioned arbitration), written discovery and responses which were received by Petitioners, depositions of both Respondents (wherein Petitioners were represented and their counsel participated and asked questions), and receipt of Respondents' Designation of Expert Witnesses. The instant appeal and writ petition relate to a Petition to Compel Arbitration filed by Petitioners on June 9, 2009, the month before Trial.

Based on all these factors, coupled with Respondents' attempt to mediate the case before filing a suit (only to be met with delay on the part of the Petitioners), the Superior Court denied the Petition to Compel Arbitration. The Superior Court rejected Respondents' spurious argument that it had given short shrift to its arguments or cited law (and particularly the argument that an arbitrator, rather than the trial court, should decide the issue of waiver).

On appeal, the California Court of Appeal, Second District, Division 4, unanimously upheld the Superior Court's ruling. Both the Superior Court and the Court of Appeal held that California law, rather than the Federal Arbitration Act ("FAA") governed the dispute. On that basis, and based on the numerous acts and omissions of Petitioners discussed herein, each court ruled that Petitioners had waived the right to arbitrate. The California Supreme Court declined to accept the case. This last-ditch Petition ensued.

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE FACTORS OF 28 U.S.C. § 1257(a) ARE NOT MET

Petitioners contend that jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1257(a), which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

There is no assertion here that any statute is unconstitutional. Furthermore, Petitioners' argument about supposed preemption completely misses the mark. As discussed in further detail above, both the Superior Court and Court of Appeal have already ruled that even if the FAA applied, the result would have been the same – the Petitioners waived the right to compel arbitration. [*See* Petition at Appendix B, p. 31a (" . . . if the FAA were deemed to apply in this matter . . . the outcome would have been the same with respect to who would make the determination of wavier"); and Petition at Appendix A (the Court of Appeal's Decision), at pp. 10a-11a (finding that the FAA did not apply and ruling that even if it had, the result would have been the same)]. The California Supreme Court declined to accept the case, leaving the Court of Appeal decision to stand. As such, since this statute

does not apply, there is no jurisdiction to grant the writ.

THE DECISIONS OF THE SUPERIOR COURT AND COURT OF APPEAL RESTED ON INDEPENDENT STATE GROUNDS, AND THEREFORE REVIEW BY THIS COURT IS UNWARRANTED

The decisions of both the Superior Court and the Court of Appeal both indicate that they were made on the basis of state law, *i.e.*, the California Arbitration Act. Since there is no federal question involved, this Court therefore should not grant the requested writ as there is no jurisdiction to do so. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 85 (per curium) (1997); *Harris v. Reed*, 489 U.S. 255, 260 (1989); and *Colorado v. Nunez*, 465 U.S. 324, 324 (per curium) (1984).

In the alternative, to the extent, if at all, this Court believes that federal law was implicated, the independent state law ground weighs against review. As this Court has repeatedly stated, "this Court has long held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests both on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989), citing *Fox*

Film Corp. v. Muller, 296 U.S. 207, 210 (1935). As such, the Court should deny the writ.

EVEN IF JURISDICTION WERE APPROPRIATE, THE CLEAR APPLICATION OF CALIFORNIA'S ARBITRATION ACT MANDATES THE SAME FINDING ALREADY MADE BY THE SUPERIOR COURT AND COURT OF APPEAL

The arbitration agreement in question provides in pertinent part as follows:

> "The arbitrator shall be a retired judge or justice, or any attorney with at least 5 years of residential real estate Law experience, unless the parties mutually agree to a different arbitrator, who shall render an award in accordance with substantive California Law. The parties shall have the right to discovery in accordance with California Code of Civil Procedure §1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part III of the California Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction."

[Petition at p. 5].

Title 9 of Part III of the California *Code of Civil Procedure* includes section 1281.2, which governs petitions to compel arbitration (such as the one

presented here by Petitioners.) That section reads, in relevant part, as follows:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, ***the court*** **shall order** the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, **unless *it determines* that**:
>
> (a) **The right to compel arbitration has been waived by the petitioner**

[Emphasis added]. It is axiomatic that the Court, in ruling on a petition to compel arbitration, has the right and in fact the duty to consider whether the party has waived the right to compel arbitration. *See, e.g., Wagner Construction Co. v. Pacific Mechanical Corp.*, (2007) 41 Cal.4th 19, 28. There, the California Supreme Court stated, in relevant part:

> ***[The fact that] "questions of waiver are for the court rather than the arbitrator require[s] no further justification than the Legislature's explicit statement to that effect in section 1281.2, subdivision (a). Given this categorical legislative determination, the hypothetical question whether arbitrators might decide waiver issues differently than courts . . . is of no concern."***

Id., 14 Cal.3d at 480 (emphasis added). Here, since the contract specifically calls out for the California

law to apply to the issues of the conduct of the arbitration, including the petition to compel arbitration, such issues were specifically for the trial court to decide and not the arbitrator (whether the FAA applied to the interpretation of the contract or otherwise). [*See* Petition at Appendix B, p. 31a (" . . . if the FAA were deemed to apply in this matter . . . the outcome would have been the same with respect to who would make the determination of wavier"); and Petition at Appendix A (the Court of Appeal's Decision), at pp. 10a-11a (finding that the FAA did not apply and ruling that even if it had, the result would have been the same)].

For the same reasons, Petitioners' argument about an asserted conflict with the Fifth Circuit Court of Appeals is of no moment. Since the Superior Court and the Court of Appeal issued their rulings based on state law grounds, any asserted conflict is completely irrelevant.[1]

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[1] Ample cases from this Court and from California courts conclusively demonstrate that California procedural rules, including *Code of Civil Procedure* § 1281.2, apply to the standard real estate purchase contract. Absent an express provision applying the FAA's *procedural* law, California law governs. *See, e.g., Volt Info. Sciences v. Leland Stanford Junior University*, 489 U.S. 468, 476 (1989); *Rosenthal v. Great Western Fin. Securities Corp.*, (1996) 14 Cal.4th 394, 405-410; *Valencia v. Smyth*, (2010) 185 Cal.App.4th 153, 196-200; and *Gravillis v. Coldwell Banker Residential Mortgage Brokerage Co.*, (2006) 143 Cal.App.4th 761, 771.

PETITIONERS COMPLETELY MISREPRESENT THE FACTS AND THE RECORD, IN THE HOPES THAT THE INACCURATE REPRESENTATIONS WOULD LEAD TO GRANTING THE WRIT

Petitioners misrepresent a number of salient facts regarding this matter, all of which can be gleaned from the lower Court's ruling appended to the Petition as Appendix B and/or the Court of Appeal's ruling appended as Appendix A.

For example, Petitioners failed to alert the Court to the fact that they engaged the mechanisms of the trial court by participating in status conferences, engaging in discovery, and receiving expert information, all prior to bringing their Petition to Compel Arbitration. [*See* Appendix B at pp. 19a-24a and 34a-36a]. In fact, Petitioners appeared at two separate Case Management Conferences (without ever apprising the Court of any desire or intent to arbitrate), attended multiple depositions (and asked questions), and waited until after expert witnesses, evidence, and strategies were disclosed to file their Petition to Compel Arbitration. *Id.*

Furthermore, petitioners assert a failure to mediate the dispute, when the Superior Court and the Court of Appeal have both already ruled on such issue and held that the dispute *was* mediated, both before *and* after the filing of the Complaint. [*See* Appendix A at pp. 3a-4a and Appendix B at pp. 18a-19a, 24a (noting that the case was mediated "a *second*

time on May 15, 2009") (emphasis added), and 34a-35a]. The Superior Court succinctly summarized this issue stating:

> Further, the Court finds, based on an evaluation of the conflicting evidence presented, that the Plaintiffs[2] version of the pre-litigation events is the more credible one. ***Thus, Plaintiffs' assertion that they sought to arrange a mediation, and were willing to participate in a second, non-mandatory one, but that the Cowitts failed to cooperate in the scheduling of either, is the more believable version based on the Court's evaluation of the competing evidence presented by the counsel for the respective parties.*** This conclusion is based on an assessment of all the evidence presented as well as the assertions made by the parties' respective counsel to this Court in pleadings and during the hearings. The Court finds the statements of [Brian] Kahn [Plaintiffs' former counsel] and [David] Dorenfeld [Plaintiffs' current counsel] the more credible ones. ***What this demonstrates is that the Cowitts were slow to participate in any mediation, resisted an arbitration when it was demanded by Plaintiffs, and then sought to delay any court proceedings by resisting***

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[2] The term "Plaintiffs" refers to Respondents Mark Reilly and Robin Morselli while the Superior Court referred to the Petitioners here, the Cowitts, by name.

> ***the timely scheduling of a further mediation. Then, on the eve of trial they filed the instant petition, which if granted would have resulted in a 'start over,' in the case. This would be prejudicial to Plaintiffs and would reward the tactics of the Cowitts.***

[Appendix B at pp. 34a-35a, emphasis added]. Similarly, the Court of Appeal stated that "the mediation was conducted [pre-litigation, in 2007] but no settlement resulted." [Appendix A at p. 3a].

The true facts of the case, as evidenced, for example, by the rulings of both the Superior Court and Court of Appeal, demonstrate that this case does not merit review by the highest Court in the land.

CONCLUSION – THIS CASE DOES NOT WARRANT SUPREME COURT REVIEW

From the very beginning of this dispute, Petitioners' strategy has been to delay Respondents' day in court as long as possible (even if that meant misrepresenting the facts to the Court; *see, e.g.*, Appendix B at pp. 24a-28a). This strategy has already succeeded in delaying a Trial for at least several years, as this case was mediated (pre-litigation) in 2007 and filed in the Superior Court in 2008.

Review here would only cause additional delay (which has been Petitioners' *sine qua non* since the inception of the instant dispute) with the end result

being the same. A review of the salient facts leads to the inescapable and inevitable conclusion that the Petitioners waived the right to seek arbitration (based on California law, and/or the fact that federal law compelled the same finding result). As such, Respondents respectfully request that the Petition for Writ of Certiorari be DENIED.

Dated: May 13, 2011

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